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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5

6 SANHO CORPORATION,

No. C 11-2473 PJH

7 Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**

8 v.

9 CIMO TECHNOLOGIES, INC.,

10 Defendants.
11 _____/

12 Defendant's motion to dismiss for lack of personal jurisdiction came on for hearing
13 on July 25, 2012, before this court. Defendant Cimo Technologies, Inc. ("CIMO") appeared
14 by its counsel Mark Thomas, and plaintiff Sanho Corporation ("plaintiff") appeared by its
15 counsel Diane Barker. Having carefully reviewed the papers and considered the parties'
16 arguments and the relevant legal authority, and good cause appearing, the court hereby
17 GRANTS the motion for the following reasons.

18 **BACKGROUND**

19 Plaintiff is a Delaware corporation with its principal place of business in Sunnyvale,
20 California. Plaintiff manufactures and distributes computer accessories for Apple products,
21 including protective covers for the Apple iPad 2 ("iPad 2"). Plaintiff sells its HyperShield
22 iPad 2 covers through its website, HyperShop.com. Plaintiff owns copyrighted photographs
23 ("images") of its HyperShield iPad 2 covers, which appear on plaintiff's HyperShop.com
24 website. The website bears the mark "Copyright © 2011 Sanho
25 Corporation" in the lower right hand corner of every webpage.

26 CIMO is a small New Jersey corporation with its principal place of business located
27 in Paterson, New Jersey. CIMO is in the business of selling technology-related accessory
28 items, including iPad 2 covers. CIMO sells its technology-related accessory items on its

1 website, cimousa.com, as well as through product listings on eBay and Amazon
2 Marketplace websites ("web-based storefronts").

3 Plaintiff discovered a number of its copyrighted images on webpages operated by
4 CIMO, including but not limited to, cimousa.com, Amazon.com, and eBay.com. Plaintiff
5 filed suit against CIMO for copyright infringement and CIMO immediately removed the
6 images from the websites. In a signed declaration, CIMO President, Yavus Bayram ("Mr.
7 Bayram"), concedes that an employee of CIMO incorporated a number of product images
8 taken from plaintiff's website in CIMO's product listings, but asserts that the copying was
9 inadvertent.

10 Plaintiff claims that as a result of CIMO's unauthorized use of its images, sales
11 dropped 40%, confusion was created in the market, and its reputation suffered damage.
12 CIMO claims its inadvertent use of the copyrighted images could not have had such an
13 effect because the images were used for only approximately 16 days, and CIMO did not
14 experience any corresponding increase in sales as a result of using the images. CIMO
15 claims it sold only a small quantity of iPad 2 covers during the time the images were used.

16 Plaintiff filed its original complaint on May 20, 2011, followed by a first amended
17 complaint on June 14, 2011, and a second amended complaint ("SAC") on April 27, 2012.
18 In its SAC, plaintiff asserts claims for copyright infringement and vicarious infringement
19 (federal law); unfair competition and false designation of origin (federal and state law); false
20 advertising (state law); and unfair competition, intentional interference with prospective
21 economic advantage, accounting, and injunctive relief (California common law). CIMO now
22 moves to dismiss plaintiff's SAC for lack of personal jurisdiction, pursuant to Federal Rule
23 of Civil Procedure 12(b)(2), among other grounds.

24 DISCUSSION

25 A. Legal Standard

26 In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the
27 plaintiff bears the burden of demonstrating that jurisdiction is proper. Mavrix Photo, Inc. v.
28 Brand Technologies, Inc., 647 F.3d 1218, 1223 (9th Cir. 2011) (citing Boschetto v. Hansing,

1 539 F.3d 1011, 1015 (9th Cir. 2008)). Where the "motion is based on written materials
2 rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of
3 jurisdictional facts to withstand the motion to dismiss." Id. (citing Brayton Purcell LLP v.
4 Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010)). "The plaintiff cannot 'simply
5 rest on the bare allegations of the complaint,' but uncontroverted allegations in the
6 complaint must be taken as true." Id. (quoting Schwarzenegger v. Fred Martin Motor Co.,
7 374 F.3d 797, 800 (9th Cir. 2004) (citation omitted)). While the court "may not assume the
8 truth of allegations in a pleading which are contradicted by affidavit," factual disputes are to
9 be resolved in the plaintiff's favor. Id. (citing Pebble Beach Co. v. Caddy, 453 F.3d 1151,
10 1154 (9th Cir. 2006); Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1284 (9th
11 Cir. 1977)).

12 In determining whether a court has personal jurisdiction over an out-of-state
13 defendant, the court first applies the forum state's long-arm statute and then considers
14 whether its application comports with federal due process requirements. Id.; see also
15 Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1484 (9th Cir. 1993). California's
16 long-arm statute is conterminous with federal requirements, thus the exercise of personal
17 jurisdiction is restricted only by due process requirements. Id.

18 For due process to be satisfied, a non-resident defendant must have "minimum
19 contacts" with the forum state, such that the exercise of personal jurisdiction "does not
20 offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington,
21 326 U.S. 310, 316 (1945) (citations omitted).

22 Personal jurisdiction over a non-resident of the forum state can be either "general" or
23 "specific." Goodyear Dunlop Tires Operations, S.A. v. Brown, ___ U.S. ___, 131 S.Ct.
24 2846, 2851 (2011). General jurisdiction requires that a defendant's contacts with a forum
25 be so "continuous and systematic" the defendant can be deemed to be present in that
26 forum for all purposes. Id. If general jurisdiction does not exist, a forum may exercise
27 "specific" jurisdiction only if the case pertains to "issues deriving from, or connected with,
28 the very controversy that established jurisdiction." Id.

1 Here, the parties agree that the court lacks general jurisdiction. Therefore, the
2 question before the court is whether specific jurisdiction exists.

3 Specific jurisdiction is satisfied when:

4 (1) the defendant has performed some act or consummated some
5 transaction within the forum or otherwise purposefully availed
6 himself of the privileges of conducting activities in the forum, (2) the
7 claim arises out of or results from the defendant's forum-related
8 activities, and (3) the exercise of jurisdiction is reasonable.

9 Bancroft & Masters, Inc. v. Augusta Nat's Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citing
10 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997)). The plaintiff bears the
11 burden of satisfying the first two prongs, and upon doing so, "the burden then shifts to [the
12 defendant] to set forth a 'compelling case' that the exercise of jurisdiction would not be
13 reasonable." Mavrix, 647 F.3d at 1228 (citing Burger King Corp. v. Rudzewicz, 471 U.S.
14 462, 476-78 (1985)).

15 The first prong, although commonly referred to as the "purposeful availment" prong,
16 refers to both purposeful availment and purposeful direction. Id. These are two distinct
17 concepts. Pebble Beach, 453 F.3d at 1155 (citing Schwarzenegger, 374 F.3d at 802.)

18 "A purposeful availment analysis is most often used in suits sounding in contract. A
19 purposeful direction analysis, on the other hand, is most often used in suits sounding in
20 tort." Schwarzenegger, 374 F.3d at 802 (internal citation omitted). Courts commonly
21 characterize copyright infringement as "a tort-like cause of action," and rely on the
22 purposeful direction framework to determine whether personal jurisdiction is proper in a
23 case where copyright infringement is alleged. See Mavrix, 647 F.3d at 1228 (citing Yahoo!
24 Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc)).

25 Here, plaintiff has alleged copyright infringement as well as several state law tort
26 claims. Therefore, purposeful direction is the appropriate framework to use when
27 determining whether personal jurisdiction is proper.

28 When determining whether a defendant purposefully directed acts at the forum
state, the Ninth Circuit employs the "effects test," which is based on the Supreme Court's
decision in Calder v. Jones, 465 U.S. 783 (1984). Id. To satisfy the test, "the defendant

1 allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum
2 state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”
3 Id. (quoting Brayton Purcell, 606 F.3d at 1128) (citations omitted).

4 B. Defendant’s Motion

5 CIMO argues that plaintiff’s claims do not arise out of or result from any
6 California-related activities. Furthermore, CIMO contends that its Internet presence is not
7 enough to constitute “something more” than mere presence on the Internet, and thus does
8 not establish that CIMO’s act was expressly aimed at California.

9 In opposition, plaintiff contends the “effects test” is satisfied, and jurisdiction is
10 proper. Addressing each element of the test, plaintiff argues, first, that CIMO committed an
11 intentional act when it copied and posted plaintiff’s copyrighted images on its websites.
12 Second, plaintiff contends CIMO’s intentional act was expressly aimed at California. In
13 support of this contention, plaintiff argues that CIMO knew or should have known that
14 plaintiff’s principal place of business was in California and thus its conduct would result in
15 effects in California, including creating competition between the parties and confusion in the
16 market. Additionally, plaintiff asserts that CIMO’s commercial, interactive website was
17 accessible to Californians and thus was expressly aimed at the forum state. Third, plaintiff
18 contends that CIMO caused foreseeable harm in California, including harm to plaintiff’s
19 business reputation and goodwill, and decreased business and profits.

20 The court addresses the three elements of the “effects test” in turn.

21 1. Intentional Act

22 “Intent” refers only “to an intent to perform an actual, physical act in the real world,
23 rather than an intent to accomplish a result or consequence of that act.” Brayton Purcell,
24 606 F.3d at 1128. Here, the intentional act requirement is easily satisfied, as CIMO
25 performed the actual, physical act of posting the copyrighted images on its website and
26 web-based storefronts.

27 2. Express Aiming

28 The Ninth Circuit has “struggled with the question whether tortious conduct on a

1 nationally accessible website is expressly aimed at any, or all, of the forums in which the
2 website can be viewed." Mavrix, 647 F.3d at 1229. The court has established that mere
3 presence on the Internet is not enough to constitute express aiming; however, the court
4 has also held that "operating even a passive website in conjunction with 'something more'
5 – conduct directly targeting the forum – is sufficient to confer personal jurisdiction." Brayton
6 Purcell, 666 F.3d at 1129 (citing Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1020
7 (9th Cir. 2002)).

8 In its opposition, plaintiff asserts that CIMO's conduct was expressly aimed at
9 California, for three reasons. First, plaintiff argues that CIMO knew plaintiff was a resident
10 of California. Second, plaintiff contends that CIMO had every reason to believe its actions
11 would put itself and plaintiff in direct competition and create confusion in the market. Third,
12 plaintiff asserts that CIMO's presence on the Internet is interactive, highly commercial in
13 nature, and accessible in the forum state. Plaintiff has presented its arguments generally,
14 and has provided minimal factual support and legal reasoning to substantiate its assertions.

15 First, plaintiff's claim that CIMO knew or should have known that plaintiff's principal
16 place of business was California is insufficient, on its own, to establish express aiming.
17 See Lang v. Morris, 823 F. Supp. 2d 966, 972 (N.D. Cal. 2011). In Pebble Beach, the
18 Ninth Circuit held that despite the fact the defendant may have known that the plaintiff's
19 residence was in the forum state, and further, that it may have been reasonably
20 foreseeable that its conduct would result in effects in the forum state, this was not enough
21 to satisfy the express aiming element. See Pebble Beach, 453 F.3d at 1157. There must
22 be "something more" than a mere foreseeable effect to conclude that personal jurisdiction
23 is proper, especially considering due process requires actual "minimum contacts." See id.
24 at 1158; see also Int'l Shoe, 316 U.S. at 316.

25 Second, plaintiff's argument that CIMO had every reason to believe its actions would
26 create competition between the parties and cause confusion in the market, again, merely
27 suggests foreseeable effects of CIMO's act. This is not enough to establish personal
28 jurisdiction. See Pebble Beach, 435 F.3d at 1158. In its opposition papers, plaintiff cites

1 only one authority, Brayton Purcell, to support its argument that CIMO's conduct was
2 expressly aimed at California. However, Brayton Purcell is distinguishable.

3 In Brayton Purcell, plaintiff sued defendant for plagiarizing its website verbatim. 606
4 F.3d at 1157. Both parties were law firms with legal practices in the area of elder abuse
5 law; moreover, both parties were residents of California. Id. at 1126-27. Plaintiff alleged
6 that the defendant "placed the two law firms in competition in the area of elder abuse law
7 and created confusion among potential clients as to the true authorship of the [plagiarized]
8 elder abuse materials." Id. at 1130. The court held that the defendant (1) knew of plaintiff's
9 existence, (2) targeted plaintiff's business, and (3) entered into direct competition with the
10 plaintiff. Id. Accordingly, the court found that the express aiming prong was satisfied. The
11 court accorded substantial weight to the fact that both parties practiced a specialized area
12 of law within the same state and advertised directly to California customers.

13 Here, CIMO is not a resident of the same state as plaintiff. Furthermore, plaintiff has
14 failed to make a prima facie showing that CIMO's website directly targeted California
15 customers.

16 This leads to plaintiff's third argument. Plaintiff contends that because CIMO's
17 website was commercial, interactive, and accessible to Californians, CIMO directly targeted
18 California customers, and thus California itself. As previously noted, the Ninth Circuit has
19 "struggled with the question whether tortious conduct on a nationally accessible website is
20 expressly aimed at any, or all, of the forums in which the website can be viewed." See
21 Mavrix, 647 F.3d at 1229.

22 In Mavrix, a celebrity photo agency with its principal place of business in Miami,
23 brought a copyright infringement action in California against an Ohio corporation, alleging
24 that the defendant had posted plaintiff's copyrighted photos on its commercial, interactive
25 website. 647 F.3d at 1221-23. On appeal, the Ninth Circuit held that the express aiming
26 element was satisfied. Upon engaging in a comparative analysis under Keeton v. Hustler
27 Magazine, Inc., 465 U.S. 770 (1984), the Ninth Circuit noted that the defendant had sought
28 and attracted nationwide audiences for commercial gain. Mavrix, 647 F.3d at 1229-30.

1 The court further explained the defendant specifically exploited the California market, as it
 2 was "clear from the record that [the defendant] operated a very popular website with a
 3 specific focus on the California-centered celebrity and entertainment industries." Id. at
 4 1230.¹ Upon finding jurisdiction, the court "acknowledge[d] the burden that [its] conclusion
 5 may impose on some *popular* commercial websites." Mavrix, 647 F.3d at 1231 (emphasis
 6 added).

7 There are some similarities between Mavrix and the instant case. In both cases
 8 defendants operated websites that were commercial and interactive. Additionally, in both
 9 cases the websites were accessible within the forum state. However, notwithstanding
 10 these few similarities, the present case is significantly distinguishable. For example, in
 11 Mavrix, it was clear from the record that the defendant's very popular website specifically
 12 targeted the California market, and focused specifically on California's unique celebrity and
 13 entertainment industries. Here, there is nothing in the record to suggest that CIMO's
 14 website was directly targeted at the California market, or that the selling of technology-
 15 related accessories, specifically iPad 2 covers, is a unique California industry.

16 In Mavrix, the court noted the impact its holding may have on popular commercial
 17 websites. See 647 F.3d at 1231. Here, however, there is nothing in the record to suggest
 18 that cimousa.com or CIMO's web-based storefronts are popular commercial websites. In
 19 fact, plaintiff does not dispute Mr. Bayram's declaration that CIMO is a small New Jersey
 20 retail business.

21 Additionally, in Mavrix, the court explained that the defendant operated its website
 22 seeking and actually attracting nationwide audiences for commercial gain. See Mavrix, 647
 23 F.3d at 1230. Here, plaintiff does not allege or prove that CIMO sought or attracted a
 24 national audience, much less a California audience. Plaintiff does not allege or prove that
 25 California customers have ever purchased iPad 2 covers from CIMO. Plaintiff merely

26
 27 ¹ The popularity of the defendant's website in Mavrix cannot be understated.
 28 "Alexa.com, an Internet tracking service, ranked [the defendant's website] as number 3,622
 out of approximately 180 million websites worldwide based on traffic. By comparison, the
 national news website MSNBC.com . . . ranked number 2,521." Mavrix, 647 F.3d at 1222.

1 states that “notably missing from Mr. Bayram’s many averments in his declaration is a
2 claim that CIMO has never sold iPad 2 covers in California.” This is not enough to
3 establish a prima facie case that CIMO does in fact have California customers.

4 Plaintiff has failed to allege facts demonstrating or making a prima facie showing that
5 CIMO engaged in conduct directly targeting or expressly aimed at California. Therefore,
6 the express aiming prong of the “effects test” is not satisfied.

7 3. Foreseeable Harm

8 The final requirement is that CIMO’s conduct must have caused harm that it knew
9 was likely to be suffered in the forum. See Yahoo!, 433 F.3d at 1206. This element does
10 not require that the “brunt” of the harm be suffered in the forum; rather, the element is
11 satisfied when the defendant’s intentional act has “foreseeable effects” in the forum. Id. at
12 1207; see also Bancroft, 223 F.3d at 1087. In this case, it is foreseeable that plaintiff would
13 be harmed by infringement of its copyright, including harm to its business reputation and
14 possible decreased profits. See Brayton Purcell, 606 F.3d 1124. Therefore, the
15 foreseeable harm element is satisfied.


16 **CONCLUSION**

17 Plaintiff has failed to establish the express aiming element of the “effects test,” and
18 therefore, the first prong of the test for specific personal jurisdiction has not been met.
19 Thus, the court need not proceed to the second and third prongs.

20 For the foregoing reasons, the court GRANTS CIMO’s motion to dismiss for lack of
21 personal jurisdiction. Consequently, the court does not reach defendant’s motion to
22 dismiss for failure to state a claim upon which relief can be granted.

23
24 **IT IS SO ORDERED.**

25 Dated: July 30, 2012

26 
27 _____
28 PHYLLIS J. HAMILTON
United States District Judge